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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. _____

RATEPAYERS FIGHT BACK

PETITIONER

V.

MIDDLE SOUTH ENERGY, INC.
ARKANSAS POWER & LIGHT CO.
ARKANSAS PUBLIC SERVICE COMMISSION
ATTORNEY GENERAL OF ARKANSAS

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgment

and opinion of the Court of Appeals entered on August 23, 1985.

QUESTIONS PRESENTED

1. Does the Arkansas Public Service Commission share concurrent jurisdiction with the Securities and Exchange Commission to regulate securities and debt issued or executed by the Arkansas Power and Light Company?

2. Can action by the Federal Energy Regulatory Commission preempt the jurisdiction of the Arkansas Commission to so regulate?

3. Does the Commerce Clause prohibit regulation by the Arkansas Commission of such securities and debt?

4. Should the courts below have abstained from hearing this case under

doctrines concerned with premature federal interference with state proceedings?

5. Did the courts below lack jurisdiction to hear this case pursuant to the "well-pleaded complaint" rule?

PARTIES

The three commissioners of the Arkansas Public Service Commission also were parties to the proceedings below. They are: Robert E. Johnston, Patricia S. Qualls, and James W. Daniel.

TABLE OF CONTENTS

	Page
Questions Presented	ii
Parties	iii
Table of Contents	iv
Table of Authorities	v
Opinions and Orders Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons For Granting the Writ	28
I. The Decision Below Conflicts With Key Provisions of the Public Utility Holding Company Act of 1935	30
II. The Decision Below Misconstrues The Federal Power Act and its Relation To The Public Utility Holding Company Act	42
III. The Decision Below Conflicts With Supreme	

Court Cases Interpreting The Commerce Clause 52

IV. The Interference By The Courts Below In State Proceedings Conflicts With Decisions Of This Court 62

V. The Subject Matter Jurisdiction Exercised By The Courts Below Conflicts With The Well-Pleaded Complaint Doctrine Of This Court 63

Appendix

TABLE OF AUTHORITIES

Page

Statutes and Constitutional Provisions

U. S. Const., Art. I., § 8, cl. 3..... 52

Ark. Stat. Ann.

§ 73-201 et seq.....6,33
§ 73-238..... 34
§ 73-255..... 34

Federal Communications Act,
47 U.S.C.

§ 151 et seq..... 47
§ 214..... 49

Federal Power Act, 16 U.S.C.

§ 824(b)..... 42,48
§ 824c(f)..... 43,49
§ 824d(a)..... 43
§ 824e(a)..... 23
§ 824q..... 43

Natural Gas Act, 15 U.S.C.

§ 717 et seq..... 47
§ 717f(c)..... 49

Public Utility Holding
Company Act, 15 U.S.C.

§ 79 et seq..... 30
§ 79a(b)..... 31,56
§ 79a(c)..... 31,56,57
§ 79b(a)(16)..... 32
§ 79f(a)..... 7,31
§ 79f(b)..... 32
§ 79g(a) and (b)..... 32
§ 79g(g)..... 7,32,57
§ 79u..... 33,57

Securities Act of 1933,
15 U.S.C.

§ 77a et seq..... 51

Cases

Alabama Electric Cooperative v. SEC, 353 F.2d 905, (D.C. Cir. 1965)..... 38

Arkansas Electric Cooperative Corp. v. Ark. Pub. Serv. Comm., 461 U.S. 375 (1983)..... 60,61

Baltimore Gas & Electric Co. v. Heintz, 760 F.2d 1408 (4th Cir. 1985)..... 61

Burford v. Sun Oil Co., 319 U.S. 315 (1943)..... 62

Chemical Bank v. Washington Public Power Supply System, 666 P.2d 329 (Wash. 1983)..... 47

City of Colton, California v. Southern California Edison Company, 376 U.S. 205, 84 S.Ct. 644 (1964)..... 46,48

Great Lakes Transmission Co. v. Michigan Public Service Comm., 180 N.W.2d 59 (Mich. Ct. App. 1970). 38,40

Indiana and Michigan Power Co. v. State of Michigan, 275 N.W.2d 450 (Mich. 1979)..... 34,37,54, 60

Jersey Central Power & Light Co. v. Federal Power Commission, 319 U.S. 61 (1942)..... 46

New England Power Company v. New Hampshire, 455 U.S. 331 (1982)..... 59

Pacific Gas and Electric Co. v. Energy Resources Comm., 75 L.Ed.2d 752, 103 S.Ct. 1713 (1983).....48

Pacific Power and Light Co., et al. v. Public Service Comm. of Wyoming, et al., 677 P.2d 799 (Wyo. 1984)..... 47

Panhandle Eastern Pipeline Co. v. Public Utilities Comm. of Ohio, 383 N.E.2d 1163 (Ohio 1978)..... 51

Pike v. Bruce Church, 397 U.S. 137 (1970)..... 61

Public Service Comm. v. Wycoff Co., 344 U.S. 237 (1952)..... 63

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941)..... 62

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950)..... 63

South Dakota Public Utilities v. F.E.R.C.,

690 F.2d 674
(8th Cir. 1982)..... 60

Southwestern Bell Telephone Co. v. Arkansas Public Service Commission, 738 F.2d 901
(8th Cir. 1984)..... 46

State ex rel. Utilities Commission v. Southern Bell Telephone Co., 217 S.E.2d 543
(N.C. 1975)..... 51

State of Minnesota, et al. v. FERC, 734 F.2d 1286
(8th Cir. 1984)..... 46

Western Union v. Michigan Public Service Comm., 338 N.W.2d 731
(Mich. App. 1983)..... 51

Younger v. Harris, 401 U.S. 37 (1971)..... 62

Administrative Decisions

Middle South Energy, SEC Holding Company Act Release No. 23495
(November 23, 1984)..... 53

Middle South Energy, 31 F.E.R.C. ¶ 61, 305
(1985)..... 24

Middle South Utilities, Inc., SEC Holding Company

Act Release No. 23579,
Memorandum Opinion
(January 23, 1985)..... 54

OPINIONS AND ORDERS BELOW

The opinions of the courts below appear in the Appendix hereto. Their citations are: 772 F.2d 404 (8th Cir. 1985) and 593 F.Supp. 363 (E.D. Ark. 1984). Also included in the Appendix is the Order to Appear and Show Cause, issued to Arkansas Power and Light Company on August 1, 1984 by the Arkansas Public Service Commission in Docket No. 84-190-U.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 23, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are set forth verbatim in the Appendix hereto. The citations are as follows: U. S. Const., Art. I., § 8, cl. 3; Federal Power Act, 16 U.S.C. §§ 824(a) & (b), 824c(f), 824d(a), and 825q; Public Utility Holding Company Act, 15 U.S.C. §§ 79a(b)(1), 79a(c), 79b(a)16, 79f(a) and (b), 79g(a), (b) & (g), and 79u; Ark. Stat. Ann. §§ 73-238, 73-254, and 73-255.

STATEMENT OF THE CASE

I. Course of Proceedings Below

The plaintiff in this case was Middle South Energy, Inc. ("MSE"), a generating subsidiary of a public utility holding company, Middle South

Utilities, Inc. ("MSU"). Another MSU subsidiary, the Arkansas Power and Light Company ("AP&L"), became a plaintiff-intervenor.

On August 31, 1984, MSE filed in the district court a complaint and petition for declaratory judgment and injunctive relief and a motion for a temporary restraining order. Defendants were the Arkansas Public Service Commission ("APSC") and its three commissioners. The purpose of the suit was to enjoin the APSC from conducting further proceedings in its Docket No. 84-190-U ("show-cause docket").

The district court granted an APSC motion to consolidate hearing of the preliminary injunction with the trial on the merits. The court recognized Ratepayers Fight Back ("RFB")[1] and the

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[1]RFB is a consumer coalition that had been recognized as a full party in

Attorney General of Arkansas as defendant-intervenors. Presiding Judge Henry Woods issued a Temporary Restraining Order, later made a Permanent Injunction on September 14, 1984, enjoining the APSC from taking further action in its show-cause docket.

The defendants and defendant-intervenors brought timely appeals to the Court of Appeals. On August 23, 1985, a three-judge panel affirmed the decision of the district court, but on different grounds. The APSC filed a timely request for rehearing, which was supported by RFB. The request later was withdrawn by the APSC by agreement with MSE and AP&L.

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the APSC show-cause docket.

The district court below apparently asserted jurisdiction under 28 U.S.C. 1337 and the Federal Power Act, 16 U.S.C. §§ 824 et seq.

II. Factual Background

The facts in this case are extensive and complex. To begin, MSU is a holding company registered under the Public Utility Holding Company Act of 1935. MSU's subsidiaries include four operating companies -- AP&L, Louisiana Power and Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L"), and New Orleans Public Service, Inc. ("NOPSI") (collectively the "system companies"). Other subsidiaries include the generating company, MSE, and a service company, Middle South Services, Inc. ("MSS"). (R. 78).[2]

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[2]In this petition, citations to the Clerk's Record will be made as R. ____; to the Trial Exhibits as Ex. ____; and

The system companies are public utilities subject to state regulation in the states where they operate. Their systems are interconnected, and they pool their power. Each company sells power to retail customers and buys power at wholesale from the others. (Ibid).

The wholesale transactions are governed by the System Agreement (Ex. 191) which is approved by the Federal Energy Regulatory Commission ("FERC"). (Ex. 169). The retail transactions are governed by state law and the decisions of state utility commissions, such as the APSC. (See, e.g., Ark. Stat. Ann. § 73-201 et seq.). Financing transactions of MSU and its subsidiaries must be approved by the Securities and

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to the Trial Hearing as T. ____).

Exchange Commission ("SEC"), and such transactions of the system companies must comply with applicable state laws. (See, The Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79f(a) and 79g(g)).

In 1974, MSE was created to finance and construct a nuclear-powered generating plant in Mississippi known as the Grand Gulf Project (the "Project"). (Ex. 5). To secure initial financing, MSE and the system companies entered into the Availability Agreement, dated June 21, 1974. (Ex. 12).

The Availability Agreement stated that MSE and the system companies would "join in executing such document or documents as may be necessary for MSEI to become a party to the System Agreement." (Ex. 13, Section 3). The

Agreement made the system companies liable for Project costs even if the plant never operated (Ex. 14, Section 5) and liable for all costs associated with a permanent shut-down of the Project. (Ex. 13, Section 4).

The system companies agreed to fulfill their obligations to MSE under the Agreement whether or not MSE ever received necessary governmental authorizations to fulfill its obligations under the Agreement or the System Agreement, and whether or not MSE actually <u>did perform</u> such obligations. (Ex. 15, Section 7).

If MSE had become a party to the System Agreement and ultimately sold the Project's power to the system companies under its terms, then the share of power for each company would have fluctuated from year to year. (Ex. 18).

MSE and the system companies submitted the Availability Agreement to the SEC for approval as a financing agreement. It was so approved on June 4, 1974 (Ex. 1729). In its order, the SEC took note "that the existing System Agreement has been accepted for filing with the Federal Power Commission..." and "that in order to permit participation by MSEI in the System Agreement, an amendment thereto will be filed with the FPC at an appropriate time." (Ex. 1732). No such amendment nor the Availability Agreement itself were ever filed for approval with the FERC. (T. 23).

In the Second Amendment to the Availability Agreement, MSE and the system companies changed course by agreeing either to execute a separate Power Purchase Agreement to govern sales

from the Project or go ahead with the original plan to make MSE a party to the System Agreement and sell power under its terms. (Ex. 25, Section 3).

This Second Amendment was submitted to the SEC for approval along with other financing transactions. (Ex. 1750). Included in the amendment was a provision to allocate costs from the Project according to the following fixed percentages: AP&L, 17.1%; LP&L, 26.9%; MP&L, 31.3%; and NOPSI, 24.7%. (Ex. 27, Section 4). This allocation, however, was not binding on the parties as to any subsequent wholesale rate submission to the FERC. (R. 137).

The fixed percentages required the consent of the banks and bondholders who were providing funds to finance the Project. (R. 135). The Second

Amendment retained the provisions requiring the system companies to pay the financing costs of the Project even if power from it was not made available to them. (Ex. 28).

As part of the original MSE application to the SEC, (1) MSU agreed to purchase 40,000 shares of MSE stock, (2) MSE and MSU entered into a Capital Funds Agreement, pursuant to which MSU would provide certain funds to MSE for Project construction, and (3) MSE entered into a Bank Loan Agreement with fourteen banks in order to borrow up to $308.5 million. (Ex. 1730). These transactions and agreements, along with the Availability Agreement, were approved by the SEC on June 4, 1974 (Ex. 1729). MSE witness Mr. Lupberger has stated the following about them:

> These agreements provided the banks with the assurance that MSE would receive sufficient equity capital to finance and operate the Grand Gulf Plant on a financially sound basis.... Because of the banks' reliance on the Capital Funds Agreement and the Availability Agreement as conditions for the Bank Loan Agreement, these agreements were integral parts of the initial financing plan for MSE.

(R. 132-33).

Since the 1974 approval of the initial financing transactions, MSE and the system companies have returned to the SEC to secure permission to amend the Bank Loan Agreement, execute new agreements for bank loans, supplement the Capital Funds Agreement, issue first mortgage bonds, and assign the rights of MSE under both the Availability Agreement and the Capital Funds Agreement to the various creditors who were financing the Project. (See, Ex. 1734-59, 1767, 1775-82).

In each instance, the banks relied on the Availability Agreement and the Capital Funds Agreement as security for the debt of MSE. AP&L, by signing and executing the Availability Agreement and its Amendments, became liable to pay a share of MSE's financing costs. But the Arkansas utility neither sought nor received approval from the APSC to execute such indebtedness. (Ex. 189).

In June of 1977, creditors of the Project began requiring MSE and the system companies to issue further indebtedness. (R. 129). Such issues came in the form of Assignments of the Availability Agreement and Assignments of the Capital Funds Agreement. They were executed with each issuance of first mortgage bonds and with each amended and restated bank loan agreement.

When MSE needed more debt financing of the Project, it and the system companies issued a new assignment as collateral security.

The Assignments provided additional security for the punctual payment of bank notes and for the satisfaction of bond purchasers. (Ex. 508-09, Section 1.1). This took the form of MSE, with the formal consent of the system companies, assigning its rights to receive payments under the Availability Agreement to the creditors should an Event of Default occur. The effect was to give the banks and bondholders the right to recover their financing advances in the Project directly from the system companies. (Ex. 508-11, Sections 1.1 - 1.4). The assignments required SEC approval to be effective. (Ex. 508, Section H).

The assignments specifically recognized that the Availability Agreement, when approved by the SEC, could remain in effect as a financing transaction, even if disapproved by the FERC as a wholesale rate. (Ex. 514, Section 2.2(b)). Section 4 of the Availability Agreement set forth a scheme whereby the system companies might receive power from MSE via the terms of the System Agreement. This constituted the "purchase power" portion of the Availability Agreement, which was subject to FERC approval to become effective as such. (Ex. 514, Section 2.2(d)). As noted above, such FERC approval was neither sought nor given.

In Section 2.2(c) of the assignments, the system companies agreed that all amounts paid by each company pur-

suant to the Availability Agreement would constitute Subordinated Indebtedness of MSE. (Ex. 514). That term meant indebtedness subordinated and junior in right of payment to the obligations of MSE to its creditors. (Ex. 512).

The effect on the system companies was to require them to pay off the debt of MSE, even if no power was received, and to become subordinated to the primary creditors of MSE. Moreover, the system company obligations were absolute and unconditional. (Ex. 515, Section 2.2(d)).

The indebtedness issued by AP&L through execution of the Assignments, with all of their "hell or high water" and "take or pay" provisions, were never

submitted to and approved by the APSC prior to their execution or thereafter. (Ex. 189).

On July 21, 1980, the chief executive officers of the system companies signed a Memorandum of Understanding whereby they agreed that AP&L should have a zero allocation of costs from the Project. (Ex. 714). This memorandum was memorialized in the Reallocation Agreement of July 28, 1981. (Ex. 34). The latter agreement purported to "hold AP&L harmless" from any obligations it might be asked to fulfill pursuant to the Availability Agreement, its Assignments, or the Power Purchase Advance Payment Agreement. (Ex. 36, Section 3). LP&L, MP&L and NOPSI agreed to indemnify AP&L by fulfilling its obligations to MSE. (Ex. 35, Section 1).

The Reallocation Agreement did not purport to indemnify AP&L for any obligations to pay for power from the Project as might be ordered by the FERC. Additionally, the Reallocation Agreement did not amend in any way the Availability Agreement and its Assignments, which remained intact. (Ex. 7).

MSE and the system companies submitted the Reallocation Agreement to the SEC, which approved it. (See, Ex. 91). In FERC Docket No. ER 82-616-000, the Grand Gulf allocation case, the Arkansas Attorney General asserted that SEC approval of the Reallocation Agreement, with a zero liability for AP&L, preempted FERC review of alternate allocations. (Ibid). The administrative law judge in that case replied: "The argument is without merit. The authority of

the SEC and this Commission are not in conflict. The SEC has sole jurisdiction over MSE's financing transactions and, as explicitly recognized by the SEC (Ex. 2), FERC has exclusive jurisdiction over the approval of the allocation of Grand Gulf...." (Ibid). The law judge did not treat the Reallocation Agreement as a wholesale rate, but instead viewed it as an agreement to facilitate financing.

In 1982, MSE and the system companies formally made their choice as to either filing an amendment to the System Agreement with the FERC or filing a separate Power Purchase Agreement that would govern sales from the Project. They chose the latter in the form of the Unit Power Sales Agreement ("UPSA"). (Ex. 39). It did not adopt or in any way incorporate the allocations pre-

viously set forth in the Availability Agreement for financing purposes.

Pursuant to this new purchase agreement, the system companies other than AP&L agreed to buy power from the Project according to these percentages:

	Unit No. 1	Unit No. 2
LP&L	38.57%	26.23%
MP&L	31.63%	43.97%
NOPSI	29.80%	29.80%
	100.00%	100.00%

(Ex. 40).

AP&L was a signatory to the agreement "solely for the purpose" of consenting to the terms and provisions thereof and would have "no rights or obligations" thereunder. (Ex. 44, Section 14). No purchaser could refuse to make payments under the agreement as a means of obtaining repayment for money paid to MSE under any of the financing agreements discussed previously. (See,

Ex. 43, Section 7). Additionally, the agreement contained no "take or pay" or "hell or high water" conditions, as was the case with the financing agreements. Rather, it was an agreement for the sale and purchase of power when and if such power was available from the Project, subject to necessary regulatory approvals. (Ex. 42, Section 2).

The UPSA was accepted for filing as a wholesale rate by the FERC on August 25, 1982. (Ex. 163).

On February 3, 1984, FERC Administrative Law Judge Ernst Liebman issued his Initial Decision Concerning Sales of Power From the Grand Gulf Nuclear Generating Plant, Docket No. ER 82-616-000. (Ex. 46). At the outset, that decision stated:

> This case involves an agreement to sell electricity from a nuclear generating plant. The broad issue is

> whether a Unit Power Sales Agreement providing for the sale of the nuclear power is just, reasonable and not unduly discriminatory within the meaning of the Federal Power Act. 16 U.S.C. 824 et seq.

(Ex. 48).

The Liebman decision never mentioned, nor in any way suggested, that any of the financing agreements concerning the Project were before the jurisdiction of the FERC.

In his decision, Judge Liebman did mention the Availability Agreement, e.g.:

> ...As a result, in 1974 MSE was established to facilitate the financing of Grand Gulf, and MSE acquired from MP&L all of MP&L's right, title and interest in the Grand Gulf project. ...To obtain a construction permit from the Atomic Energy Commission and initial construction financing, all four Middle South operating companies, including AP&L, entered into an Availability Agreement with MSE which required each company to put their credit support behind the Grand Gulf

> project. All four operating companies, including AP&L, are still financially liable for Grand Gulf costs in proportion to the specific percentages set forth in the Second Amendment to the Availability Agreement.

(Ex. 63, citations to record omitted).

Citing Sections 206(a) and (b) of the Federal Power Act, 16 U.S.C. § 824e(a), Judge Liebman found that the FERC could assert authority over the Unit Power Sales Agreement (Ex. 85). Ultimately, he modified the agreement as proposed, so that the allocation percentages became as follows:

	Unit 1
AP&L	36%
LP&L	14%
MP&L	33%
NOPSI	17%

(Ex. 95-96). The law judge then refused to allocate power and energy from Unit 2 of the Project at this time, stating:

"The rationale today for making an allocation today of Unit No. 2 may not be valid when the Unit is completed; a different allocation based on a different rationale may then be appropriate." (Ex. 96). He made this decision on Unit No. 2 even though the Availability Agreement and the Reallocation Agreement contained fixed allocations for the Unit that had received SEC approval for financing purposes.

The above-mentioned wholesale power allocation later was approved by the full FERC. Middle South Energy, 31 F.E.R.C. ¶ 61, 305 (1985).

On August 1, 1984, after conducting a formal investigation, the APSC established Docket No. 84-190-U, through an Order to Appear and Show Cause. (Ex. 184). The order was

directed to AP&L to "show cause why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf Project should not be held to be void ab initio as a matter of law." (Ex. 189). The Commission listed thirty-six agreements which were to be the subject of its show-cause hearing. (Ex. 184-88). The Reallocation Agreement and the Unit Power Sales Agreement were not so listed. Neither of the latter agreements contained obligations agreed to by AP&L to pay costs associated with the Project, and the UPSA was a proposed wholesale rate before the FERC for approval. Some of the agreements listed were not executed by AP&L, but many of them defined the nature and amount of obligations incurred by AP&L.

The agreements that were listed in the show-cause order included the Availability Agreement and its Amendments and Assignments, the Capital Funds Agreements and their Assignments, and the various Bank Loan Agreements and their Amendments. In its order to show-cause, the APSC concluded "that the obligations purportedly imposed upon AP&L by some or all of the [thirty-six] agreements constitute prima facie violations of Ark. Stat. Ann. §§ 73-238, 253, & 255 (Repl. 1979)." (Ex. 189, emphasis supplied). The Commission also stated that AP&L had never sought nor received the authorization of the APSC to assume any share of the indebtedness of MSE. (Ex. 189).

AP&L filed a motion with the APSC urging dismissal of the show-cause pro-

ceeding. (Ex. 1643 - I). The motion denied that the APSC had jurisdiction over any of the thirty-six agreements, that they constituted an evidence of indebtedness, contract, lease or rental as those terms are used in Ark. Stat. Ann. §§ 73-238, 253 or 255, or that AP&L violated any state law by executing certain of the agreements without APSC approval. (Ibid). AP&L did not allege any harm, irreparable or otherwise, to itself or MSE in its motion to dismiss.

In a ten-page order dated August 31, 1984, the Commission denied AP&L's motion to dismiss. (Ex. 1634). The order stated that the Commission had "the statutory authority and jurisdiction to review the agreements in question." (Ex. 1637).

In his testimony filed in the show-cause docket, MSE witness Edwin Lupberger stated that APSC action to invalidate the Project's financing agreements would have no effect on an FERC-approved wholesale rate to allocate power from the Project. (R. 140).

REASONS FOR GRANTING THE WRIT

This case is one of first impression, and it will offer this Court an opportunity to preserve the carefully-balanced scheme of regulation of utility holding companies in existence since 1935. The courts below would radically transform that scheme into one excluding the state role presently set forth in federal law. Only Congress, if anyone, should be so bold.

In essence, the APSC sought to exercise its concurrent jurisdiction with the SEC to regulate financial agreements executed by a subsidiary of an electric utility holding company. That subsidiary, AP&L, is subject to APSC jurisdiction under Arkansas law. The district court, even though the agreements were approved by the SEC and never even submitted to the FERC for approval, held they were subject to exclusive FERC jurisdiction. In fact, the district court went so far as to hold that <u>any</u> agreements "integrally related" to a wholesale electric power project are subject to exclusive FERC jurisdiction and that any other agreements "essential to" the project are beyond state control.

The Court of Appeals tried a different approach by finding that state regulation of the agreements would place an impermissible burden on interstate commerce. Both courts were willing to render their judgments even though the APSC had not held hearings or issued a final order in its show-cause docket.

If the court below is not reversed, then a precedent will be set to allow subsidiaries of utility holding companies to escape state regulation with impunity and in direct contradition to the purposes of the Public Utility Holding Company Act of 1935.

I. The Decision Below Conflicts With Key Provisions of the Public Utility Holding Company Act of 1935.

The Holding Company Act, 15 U.S.C. § 79, et seq., expressly protects the

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I. The Decision Below Conflicts With Key Provisions of the Public Utility Holding Company Act of 1935.

The Holding Company Act, 15 U.S.C. § 79, et seq., expressly protects the

jurisdiction of states to regulate securities issued by subsidiaries of electric utility holding companies. In Sections 79a(b) and (c) of the Act, Congress sets forth a strong policy statement as to the "evils" of holding companies that can adversely affect the national interest, investors, and consumers. One such evil entails the issuance of securities "...without the approval or consent of the states having jurisdiction over subsidiary public-utility companies...." Id., § 79a(b)(1). The declared policy of the Act is to eliminate the evils cited. Id., § 79a(c).

In Section 79f(a), the Act makes it unlawful for a holding company or subsidiary company thereof to issue or sell any securities without SEC approval, unless otherwise exempted by the Act.

One exemption applies when a subsidiary company, having received expressed authorization by the appropriate state commission, issues the security for the sole purpose of financing its own business operations. Id., § 79f(b).

Sections 79g(a) & (b) of the Act require a holding company or subsidiary thereof to file for approval with the SEC a declaration that proposes the security to be sold. According to Section 79g(g), compliance with state law is a condition that must be met prior to a declaration becoming effective. Such requirement applies to all securities issued.

The term "security" is broadly defined by Section 79b(a)(16) to include "... any note, draft, stock, treasury stock, bond [or] debenture ..." and any

"... guaranty of, [or] assumption of liability on ..." any of the foregoing. (Emphasis supplied).

Section 79u states that nothing in the Act shall affect the jurisdiction of any state commission over any person, security or contract, insofar as such jurisdiction does not conflict with any provisions of the Act.

Middle South Utilities, Inc. is a holding company registered under the Public Utility Holding Company Act. Arkansas Power and Light Company is a subsidiary of MSU.

The Arkansas Public Service Commission regulates AP&L pursuant to Act 324 of 1935, Ark. Stat. Ann. § 73-201 et seq. Such regulation includes the authority to control the issuance and sale of securities.

Specifically, a utility such as AP&L may not "issue stock, bonds, notes or other evidence of indebtedness" without prior APSC approval. Id., § 73-255. Any such security made without APSC approval shall be void. Ibid. The APSC may initiate court or other proceedings as may be effective to release a utility from any contract made in violation of the Act. Id., § 73-238.

In 1979, the Supreme Court of Michigan decided issues remarkably similar to those of the instant case. Indiana and Michigan Power Co. v. State of Michigan, 275 N.W.2d 450 (Mich. 1979). In that case, a subsidiary of an electric utility holding company challenged the jurisdiction of the Michigan Public Service Commission to regulate security issuances of the subsidiary.

The subsidiary, Michigan Power Company, was organized solely to construct and operate a nuclear generating plant. It was to sell power wholesale from the plant to its parent, Indiana and Michigan Electric Company. The parent sold power at retail and wholesale and was itself owned by American Electric Power Company, Inc., a public utility holding company. The holding company parent owned operating companies in seven states. Their operations were physically interconnected and coordinated as a single, integrated electric utility system. Power purchases from the nuclear project were to be regulated by the Federal Power Commission (now FERC).

In challenging state jurisdiction, the subsidiary argued that regulation by

the SEC of the securities or regulation by the FPC of the wholesale power rate preempted state authority. The Court held:

> The Holding Company Act also, we are convinced, contains a clear expression of Congressional intent not to remove from the states power over the securities of local subsidiary operating companies as exercised through the state public service commissions. State commissions have not been divested of all jurisdiction over the securities of these companies. Rather, a partnership of concurrent state-federal control has been created.

Id. at 454. The Court so held even though the securities had been "subject to thorough SEC regulation." Id. at 455.

As to possible preemption under the Federal Power Act, the Court said: "...we find no Congressional intent to preempt the states in this area in the

Federal Power Act which granted rate jurisdiction to the FPC." Id. at 455. Finally, the Court rejected any notion of preemption under the Commerce Clause. Id. at 456.

The case law does not abound with decisions on issues similar to those in Michigan Power Company. Utilities are likely intimidated by the clear language of the Holding Company Act. It can only be construed as preserving the jurisdiction of states to regulate the securities of utilities within their borders. As cited above, Arkansas law clearly grants such jurisdiction to the APSC. When AP&L issues securities solely to finance its own business, the APSC regulates them. When AP&L issues securities to finance the business of its parent holding company system, both

the APSC and the SEC regulate them. "The purpose of the Public Utility Holding Company Act, as shown by its legislative history, was to supplement state regulation -- not to supplant it." Alabama Electric Cooperative v. SEC, 353 F.2d 905, 907 (D.C. Cir. 1965).

A narrow exception to the general rule concerning state jurisdiction was carved out in Great Lakes Transmission Company v. Michigan Public Service Commission, 180 N.W.2d 59 (Mich. Ct. App. 1970). In it, the state commission attempted to regulate the securities of a natural gas pipeline company (a) which was not registered to do business in Michigan, (b) whose operations were restricted to the transportation of gas and in no way were regulated by the state commission, (c) which made no gas

sales to retail customers in Michigan, but only transported gas in interstate commerce, and (d) whose facilities were regulated by the FERC. Since the pipeline company was a subsidiary of a utility holding company, its securities were regulated by the SEC. Stressing the unique interstate character of the pipeline company, with its operations not otherwise regulated by the state commission, the Michigan court held narrowly:

> In summary, the Michigan Public Service Commission has no jurisdiction to regulate the issuance of securities by a corporation such as Great Lakes, engaged in the transmission of natural gas in interstate commerce where no sales thereof are made directly to consumers.

Id. at 64.

The court also held that the state commission could exercise concurrent

jurisdiction with the SEC to regulate the securities of a holding company subsidiary if it were a gas company engaged in the intrastate business of retail sales. Id. at 62.

Great Lakes is supportive of APSC jurisdiction over AP&L's execution of the Grand Gulf financing agreements. AP&L is registered to do business in Arkansas; its retail operations are regulated by the APSC; it makes retail sales directly to customers in Arkansas; and its generating facilities are regulated by the APSC. Moreover, AP&L's operations are not solely interstate in nature. Under the principles set forth in Great Lakes, a state commission could exercise concurrent jurisdiction with the SEC over the security transactions of a utility such as AP&L.

As seen in the Statement of the Case, AP&L explicitly pledged its credit to help finance the Project. Its credit was used as collateral and security for the debt of MSE to its creditors. All such evidences of indebtedness -- the Availability Agreement, its Amendments and Assignments -- were submitted to and approved by the SEC. They were never submitted to the APSC for concurrent approval. Without such approval, they are void as a matter of law.

The opinion below rejected APSC jurisdiction and thus conflicts with the clear purpose of the Holding Company Act, justifying the grant of certiorari herein sought.

II. The Decision Below Misconstrues The Federal Power Act and its Relation To The Public Utility Holding Company Act.

In its decision, the court below suggests that the Federal Power Act denies the APSC any authority to regulate the agreements in question. This conclusion apparently results from the court's reliance on the District Court's erroneous finding that the APSC sought to regulate "agreements for the purchase of wholesale power in interstate commerce." Although the Court of Appeals ruled on other grounds, there exists sufficient conflict on this point to justify a discussion of the Federal Power Act.

The Federal Power Act, 16 U.S.C. § 824(b), establishes the jurisdiction of the FERC to regulate the transmission

of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. The Commission's jurisdiction extends to the setting of rates and charges for the transmission and sale of such electric energy. Id., § 824d.

The Act grants the FERC authority over the issuance of utility securities, but not those involving "a public utility organized and operating in a state under the laws of which its security issues are regulated by a state commission." Id., § 824c(f). Furthermore, when a conflict of jurisdiction exists between the FERC and the SEC as to the approval of utility securities, the former agency will relinquish jurisdiction to the latter. Id., § 825q.

MSE and the system companies did not go to the FERC for approval of the financing agreements. They were never submitted to the FERC for approval of any kind. Nonetheless, MSE and AP&L insist that the agreements are subject to exclusive FERC jurisdiction. If this were true, then SEC regulation of them would be rendered meaningless, and they would go unregulated as securities and financing transactions.

There is no conflict of jurisdiction between the FERC and the SEC on these matters, nor between the FERC and the APSC, should the latter regulate AP&L's indebtedness for the Project. Such regulation by the APSC will have no effect on FERC setting of the Project's wholesale power rate. This point has been unequivocally conceded by MSE's

key witness in written testimony before the APSC in its show-cause docket: "First of all, any action taken by this Commission in this proceeding will not affect the decision by the FERC, or the Courts, with respect to the allocation of Grand Gulf power." (R. 140).

The obligations incurred by the system companies were to retire the debt of MSE to the bankers and bondholders even if the plant never operated, with payments to begin on specified dates. Additionally, the system companies incurred liability if the creditors demanded payment in full following an Event of Default. All such obligations could be activated independently of any obligations incurred by the system companies pursuant to a wholesale power rate.

For the foregoing reasons, any decisions concerning FERC preemption over wholesale power rates are not relevant to this case. E.g., City of Colton, California v. Southern California Edison Company, 376 U.S. 205, 84 S.Ct. 644 (1964); Southwestern Bell Telephone Co. v. Arkansas Public Service Commission, 738 F.2d 901 (8th Cir. 1984); and State of Minnesota, et al. v. FERC, 734 F.2d 1286 (8th Cir. 1984).

Moreover, this Court has recognized that the Federal Power Act expressly allows a state to regulate the security transactions of utilities subject to state regulation. Jersey Central Power & Light Co. v. Federal Power Commission, 319 U.S. 61, 73 (1942).

Additionally, the Supreme Courts of Wyoming and Washington have upheld state

authority to regulate agreements that pledge the credit of jurisdictional utilities to pay the financing costs of power plants, even when such agreements contain language as to the purchase of power from the plant. Pacific Power and Light Co., et al. v. Public Service Commission of Wyoming, et al., 677 P. 2d 799 (Wyo. 1984), and Chemical Bank v. Washington Public Power Supply System, 666 P. 2d 329 (Wash. 1983).

Any cases decided pursuant to the Natural Gas Act (NGA), 16 U.S.C. § 717 et seq., and the Federal Communications Act (FCA), 47 U.S.C. § 151 et seq., are not depositive of the issues herein. This conclusion is sound even though this Court has held that decisions applying the NGA can be used to define the jurisdictional scope of the Federal

Power Act. City of Colton, supra. Key differences exist between the NGA and FCA on the one hand and the FPA on the other, relevant to federal jurisdiction over utility securities.

The FPA does not grant to the FERC authority to issue certificates of convenience and necessity for new electric generating facilities. Rather, such authority has remained with state utility commissions. Pacific Gas and Electric Co. v. Energy Resources Comm., 75 L.Ed.2d 752, 103 S.Ct. 1713 (1983). The Act expressly precludes the FERC from exercising jurisdiction over "facilities used for the generation of electric energy." 16 U.S.C. § 824(b). Additionally, while the Act grants the FERC authority over the issuance of utility securities, it exempts securities

regulated by a state commission. Id., § 824c(f).

In contrast, the NGA grants sole authority to the FERC to issue certificates of convenience and necessity for facilities engaged in the transportation or sale of natural gas. 15 U.S.C. § 717f(c). Likewise, the FCA grants authority to the Federal Communications Commission to issue such certificates for the facilities of telephone companies. 47 U.S.C. § 214.

FERC jurisdiction to regulate the securities of natural gas companies emanates from the agency's authority under the NGA to issue certificates of convenience and necessity. Natural Gas Pipeline Company of America, et al. v. Illinois Commerce Commission, 33 Ill.2d 214, 210 N.E.2d 490, 492. The NGA,

unlike the FPA, does not exempt from FERC regulation securities regulated by a state. Thus, the court in Natural Gas Pipeline held that state regulation of the securities in question "would create the 'prospect of interference with the federal regulatory power' over plans for financing the construction or extension of facilities subject to jurisdiction of the Federal Power Commission." Id. at 494.

It should be emphasized here that the FERC, pursuant to the FPA, has not and cannot regulate the Grand Gulf Project as to a certificate of convenience and necessity or securities for plant financing.

The decision in Natural Gas Pipeline has no application to the instant case. State jurisdiction there

was struck down owing to a conflict with jurisdiction exercised by the FERC. APSC regulation of the Grand Gulf financing agreements cannot conflict with FERC jurisdiction. For similar reasons, other decisions are not on point with the instant case: E.g. Western Union v. Michigan Public Service Commission, 338 N.W.2d 731 (Mich. App. 1983); Panhandle Eastern Pipeline Company v. Public Utilities Commission of Ohio, 383 N.E.2d 1163 (Ohio 1978); and State ex rel. Utilities Commission v. Southern Bell Telephone Company, 217 S.E.2d 543 (N.C. 1975). In each case, state regulation of securities would have conflicted with their regulation by federal agencies.[3]

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[3]In the two telephone company cases, federal jurisdiction was exercised by the SEC, but not pursuant to the Public Utility Holding Company Act. Rather, the SEC regulated pursuant to the Securities Act of 1933, 15 U.S.C.

The conflicts raised by the courts below on this issue of FERC preemption provide additional justification to grant the certiorari sought herein.

III. The Decision Below Conflicts With Supreme Court Cases Interpreting The Commerce Clause.

The issue presented to the court below involved whether the Federal Power Act preempted APSC review of AP&L's indebtedness, as found by the District Court, or whether the APSC and the SEC share concurrent jurisdiction thereof. Instead of resolving this question, the Court of Appeals applied a Commerce Clause analysis under U.S. Const., Art. I, § 8, cl. 3. That analysis must fail for at least three reasons: it is

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§§ 77a et seq. This fact also serves to distinguish these decisions from the instant case.

inappropriate to apply owing to an explicit recognition by Congress of the right of states to legislate in this area; it is premised on erroneous and unfounded assertions as to APSC intent; and the effect on interstate commerce of possible APSC action would be incidental at worst.

First, the SEC has specifically recognized APSC jurisdiction over AP&L's financial commitments to the Grand Gulf project. Middle South Utilities, Inc., SEC Holding Company Act Release No. 23495 (November 23, 1984). In that decision, the SEC approved the issuance of MSE bonds and said that it

> does not resolve disputed issues of state law and the order in this case does not prejudice the Arkansas Commission, which may assert jurisdiction under whatever procedures the state law permits.

See Note 5, Opinion of Court of Appeals, Appendix herein. In a similar proceeding, Middle South Utilities, Inc., SEC Holding Company Act Release No. 23579, Memorandum Opinion (January 23, 1985), the SEC stated:

> Our approval of the availability agreement ... did not mean that state law was preempted. Section 21 declares that nothing in the [Holding Company] Act shall affect the jurisdiction of any other commission ... so long as such jurisdiction is not in conflict with the Act.... The authorization of the availability agreement in 1974 and the amendments in 1981 determined only that Federal requirements under the Act have been met.

Id. at 7-8. The SEC opinion made it clear that APSC exercise of jurisdiction should come in state proceedings, rather than before the SEC. Id.

Additionally, the utility whose securities were regulated by the state

in Michigan Power Company, supra, was engaged solely in the sale of wholesale power. Nonetheless, the court held: "...Congress, which has legislative authority over interstate commerce, has explicitly recognized and affirmed state jurisdiction in legislating in the area." 275 N.W.2d 450, 456. To illustrate federal recognition of a state role, the court cited the same provisions of the Holding Company Act relied on by the petitioner in this case.

It is undisputed, even by the court below, that the Federal Power Act and the Holding Company Act specifically address the right of states to regulate the securities of electric utilities operating within their borders. But the court below, by drawing on several cases

not on point with this one, labored to hold that the statutes "do not preclude us from finding a violation of the commerce clause here." Throughout its discussion of this issue, the court searched in vain for any statements in the Holding Company Act that "insulate the APSC's actions from examination under the commerce clause." Several statements in the Act, however, lead to that very conclusion.

In Sections 79a(b) and (c) of the Act, Congress set forth a strong policy statement declaring that an evil to be eliminated is the issuance of securities "...without the approval or consent of the states having jurisdiction over subsidiary public-utility companies...." Id., § 79a(b)(1). That statement went on to declare that the evils to be eli-

minated are "connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce." Id., § 79a(c), emphasis supplied.

To assist the states in regulating utility securities, Congress empowered the SEC to approve them but only when state laws also were complied with. Id., § 79g(g). Moreover, in Section 79ù, Congress specifically reserved jurisdiction to the states, "insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder." The court below did not suggest that APSC jurisdiction over the agreements in question would conflict with the Act or SEC action. Failing such conflict, a

reasonable statutory interpretation would hold that a state may regulate in this area, as does the SEC, despite any impact on interstate commerce.

Second, in seeking to find a discriminatory purpose by the APSC in its show-cause docket, the court below erroneously concluded that "the APSC is trying to secure for Arkansas the zero allocation" of Grand Gulf disallowed by the FERC. "Arkansas...seeks to close its borders to high-cost electricity," the court continued, and this creates "a preference for citizens in the regulatory jurisdiction gained at the expense of out-of-state customers." Such assertions are not supported by the record in this case: to regulate utility securities and indebtedness is not to regulate wholesale power allocations and

transmission. The contracts listed in the show-cause order do not control the allocation or transmission of Grand Gulf electricity. Additionally, APSC regulation of them would not operate at the expense of out-of-state citizens. For these reasons, the lower court's reliance on such decisions as New England Power Company v. New Hamphsire, 455 U.S. 331 (1982), is unsound and will result in a far broader application of the Commerce Clause than intended by this Court.

Third, any APSC action taken through its show-cause docket would have only an incidental effect on interstate commerce. The regulation of utilities is one of the most important functions of the police power of the states. Ark. Electric Cooperative Corp. v. Ark. Pub.

Serv. Comm., 461 U.S. 375 (1983). A state has a very substantial interest in the issuance of securities under its laws by a company organized and operating within that state. Indiana Michigan Power Co. v. State of Michigan, 275 N.W.2d 400 (1979). Arkansas thus has a legitimate local interest in protecting the financial integrity of utilities within its borders and the public interest of its citizens who deserve proper state oversight of a utility's indebtedness. Even the Eighth Circuit Court has recognized the states' interests in regulation of local public utilities. South Dakota Public Utilities v. F.E.R.C., 690 F.2d 674 (8th Cir. 1982).

Unless the burden imposed on interstate commerce is excessive rela-

tive to local benefits, evenhanded state regulation of a legitimate local public interest is upheld if its effect on interstate commerce is incidental. Pike v. Bruce Church, 397 U.S. 137 (1970). As for the burden, MSE presented evidence at trial that financial markets and investors in MSU stock were subjected to uncertainty and unrest by the show-cause docket. Such incidental effects are not the type of discrimination forbidden by the Commerce Clause. Baltimore Gas & Electric Co. v. Heintz, 760 F.2d 1408 (4th Cir. 1985). Arkansas' interest in regulating the securities of a utility within its borders outweighs any incidental impact on creditors in other states. Such interest can be reasonably compared to the one upheld in Ark. Electric Cooperative Corp., supra.

The lower court's decision clearly conflicts with this court's application of Commerce Clause principles, offering another justification to grant the writ sought herein.

IV. The Interference By The Courts Below In State Proceedings Conflicts With Decisions Of This Court

Both the district court and court of appeals should have abstained from interfering with the APSC show-cause proceeding under doctrines established by this court in Younger v. Harris, 401 U.S. 37 (1971), Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). This justifies the grant of certiorari requested herein.

V. The Subject Matter Jurisdiction Exercised By The Courts Below Conflicts With The Well-Pleaded Complaint Doctrine Of This Court

MSE's assertion of federal preemption, the central issue raised in its complaint to the district court below, actually constituted a defense to the allegations raised in the APSC show-cause order, and thus conflicts with 28 U.S.C. § 1331(a) and § 1337, as interpreted by this court in Public Service Comm. v. Wycoff Co., 344 U.S. 237 (1952) and Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). This provides further justification to grant the certiorari sought by the petitioner.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

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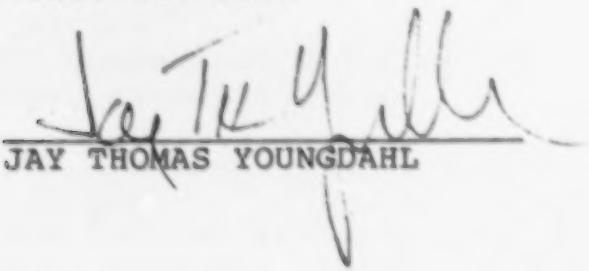

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above and foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit, with Appendix, by regular mail, postage pre-paid, on this 21st day of November, 1985 to the following:

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